Prospects for United Nations Protection of the Human Rights of Indigenous Minorities

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Indians in the United States and Canada and Aborigines in Australia have begun to explore in recent years the possibilities of bringing before an international forum complaints about denials of human rights for which they have been unable to obtain redress at home. In August 1972 I attended a meeting of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in New York with accreditation from the International Federation of Women Lawyers.[1] My experiences in attempting to bring before the Sub-Commission the question of Aboriginal land rights led to some insight into the workings of the United Nations, the extent to which it is political in character and the implications this has for the future prospects of effective action to protect human rights.

FIDA first tried to have a written statement circulated to members of the Sub-Commission on the topic of Aboriginal land rights.[2] However, officials of the Commission on Human Rights took the view that, as the statement referred to the position in one country (Australia), the government of that country should be given the opportunity to read and comment on it before it was circulated. Since this would have meant considerable delay FIDA instead adopted the alternative of making an oral intervention. The Sub-Commission will allow a representative of a non-governmental organization (NGO) with consultative status to make a brief speech addressed to an agenda item at a time when no member of the Sub-Commission wishes to speak. Thus a brief statement on indigenous land rights, watered down so that it did not appear to be such a direct attack on Australian government policy, was introduced into the minutes of the Sub-Commission.

As the press in Australia showed no interest in reporting this event it is unlikely to have had any effect on the then Australian government. In considering appeals to United Nations bodies Aborigines have had in mind the effect of world publicity on the government rather than any more direct enforcement procedure to uphold their human rights. Australian policy in Papua New Guinea has clearly been influenced by United Nations Visiting Missions and by the fear of adverse international publicity. Aborigines hoped that a similar effect would be produced by bringing their grievances before the world body. This first experience is not encouraging. Should it then lead to total disillusionment and the rejection of the United Nations as an upholder of indigenous rights? If this were to be so it would be a serious indictment of the United Nations since many of its published documents purport to outlaw racial discrimination or are otherwise directed

towards the protection of indigenous minorities. The answer to the question depends on the availability of alternative enforcement procedures which might have been selected in preference to the method of oral intervention before the Sub-Commission. Consideration also needs to be given to the question of whether the oral intervention could have been used more effectively.

Alternative Enforcement Procedures Available to NGOs

NGOs have the opportunity to contribute to the procedure for periodic reports voluntarily submitted by governments under ECOSOC resolution 1074C (XXXIX) of 28 July, 1965. Governments which respond to the invitation to supply information submit reports on civil and political rights; on economic, social and cultural rights; and on freedom of information.[3] NGOs were invited to submit "objective" material relating to the periodic reports. The Economic and Social Council requested the Secretary General.

"in accordance with the usual practice in regard to human rights communications to forward any material received from non-governmental organizations . . . mentioning any particular States . . . to those Member States for any comments they may wish to make."[4]

The Sub-Commission on Prevention of Discrimination and Protection of Minorities was delegated to carry out the initial study of the periodic reports. The Special Rapporteur appointed by the Sub-Commission in 1966 criticised the reports received from governments as often being "excessively optimistic or overly complacent."[5] On the other hand, he pointed out the value of NGO comments in redressing the balance and giving a truer picture of the human rights situation. The fourth annex to his report consisted of a summary of NGO comments and the responses of the governments concerned.

The presentation of this report to the Sub-Commission elicited strong protest from some members, presumably those representing countries whose governments had been criticised by the NGOs. The fourth annex was deleted from the report. Later a new procedure for dealing with periodic reports was adopted, designed to reduce the risk (to governments) that any critical material would be made public, even to the restricted audience of members of the Sub-Commission. The potential effectiveness of NGOs in highlighting abuses of human rights by commenting on periodic reports has therefore been seriously reduced.

Another procedure open to NGOs is to submit communications (that is, complaints or petitions) to the Commission on Human Rights or, if they deal with discrimination and minorities, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1970 the Sub-Commission adopted a new procedure for dealing with communications.[6] It set up a Working Party

"to consider all communications, including replies of governments thereon . . . with a view to bringing to the attention of the Sub-Commission those communications, together with the replies of governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."

The authorised procedure provides for consideration by the Sub-Commission of communications brought before it by the Working Group with a view to deciding whether to refer them to the Commission on Human Rights. The Commission may then determine to carry out a thorough study of the

situation and submit a report and recommendations to ECOSOC or it may set up an ad hoc committee to undertake an investigation but this may be done "only with the express consent of the State concerned."

Some NGOs had high hopes for the effectiveness of this new procedure but the first experience of its operation at the meeting of the Sub-Commission in August 1972 was not promising.[7] The Sub-Commission considered communications on Greece, Iran and Portugal referred to it by the Working Group. Instead of taking any decisive action the Sub-Commission referred them back to the Working Group for another year. The rationalization for this action was that the governments concerned had not commented on the communications. But it appears to be yet another example of the timidity of United Nations bodies when faced with the prospect of having to criticise a government. The three governments had already been given the opportunity to reply to the communications. The terms of the 1970 resolution by referring to "the replies of governments, if any" clearly contemplate that further action may be taken even if governments do not respond. The delay imposed by the Sub-Commission's 1972 decision hardly protects the individuals in Greece, Iran and Portugal on whose behalf complaints of fundamental invasions of human rights have been made.

Another area of involvement of NGOs is in relation to the studies of specific rights or groups of rights undertaken by the Commission on Human Rights and the Sub-Commission. NGOs in consultative relationship may submit material to the Rapporteurs who make these studies. FIDA's oral intervention of 1972 on indigenous land rights not only brought this matter before members of the Sub-Commission but was particularly brought to the attention of Mr José R Martínez Cobo, the Special Rapporteur who is making a study of the Problems of Discrimination against Indigenous Populations. Further material has since been supplied to him. The Reports of such studies may lead to further action by UN bodies. They may, for example, be used in the drafting of human rights Conventions.

But NGOs have complained that the Commission on Human Rights has delayed unduly its examination of some of these studies and then has given them inadequate consideration. The Commission has not yet given adequate consideration to three Sub-Commission studies which were completed in 1962, 1963 and 1967 respectively.[8]

Enforcement Procedures Open to Individuals, Governments and UN Officials

It is apparent from the above discussion that enforcement procedures available to NGOs are largely ineffective in producing redress for the denial of human rights. Are there then any alternative procedures not open to NGO intervention but which could be availed of by others anxious to raise human rights issues in an international forum?

As might be expected, if NGOs are constantly frustrated in their efforts to obtain effective implementation of human rights standards, individuals who wish to complain of violations have even less chance of success. In most cases nothing is done about the thousands of complaints or petitions which annually reach the United Nations.[9] Individuals may seek the assistance of NGOs in putting forward their case. The communication on Greece considered by the Sub-Commission in 1972, for example, was compiled by Professor Frank Newman as counsel for a number of NGOs and for seven

Greek exiles who individually complained of violations of their human rights.

There is no effective right of individual petition before the United Nations as there is to the European Court of Human Rights. No States have accepted the right of individual petition to the Committee on the Elimination of Racial Discrimination though there is provision for them to do so.

The Covenant on Civil and Political Rights contains provision for one State to complain about another State's failure in the human rights area. However, governments are generally reluctant to complain about other governments. Even when such procedures are used they are often motivated by the desire to make propaganda rather than by any real concern about the invasion of human rights.

Many United Nations officials appear to take a narrow view of the functions of the UN, and their interpretations of ECOSOC resolutions, for example, have the effect of limiting the extent to which NGOs can effectively operate as pressure groups. Other UN executives, like the High Commissioner for Refugees, have taken a braver stand and expanded their role to provide greater protection for the rights of individuals.

This has not been an exhaustive review of all the enforcement procedures available at the United Nations.[10] But the overall depressing picture of largely ineffective sanctions is a fair one. The United Nations has achieved little in the way of implementation of human rights as compared with its success in defining them.

The Political Character of the United Nations

Whatever disappointment one feels about this failure to protect human rights it is not so surprising when one considers that the United Nations was set up by governments rather than by men. Professor Macmahon Ball recalls the San Francisco Conference in 1945. The United Nations Charter's statement of the determination to protect human rights was an expression of deeply felt needs. But when it came to setting up the procedures of the UN "no nation was ready to surrender the claim to sovereignty, which in effect means the right to be judge in its own cause."[11]

The nation states succeeded in having written into the Charter the rule of non-intervention by the United Nations in "matters which are essentially within the domestic jurisdiction of any State." (Article 2, Paragraph 7). In the same spirit is the United Nations practice of referring adverse communications to governments for comment.

Governments further seek to protect themselves against critical attacks by making political appointments to United Nations bodies. The Sub-Commission on Discrimination and Minorities is intended to be a body of independent experts. Though appointed by governments, they are to act as individuals rather than as representatives of their governments. The fact that some governments have adhered to the spirit of the Sub-Commission's constitution is responsible for its relative independence and impartiality, when compared with the Commission on Human Rights, which is frankly political. But many nations have appointed government employees to the Sub-Commission, either as members or as alternates who in fact attend most meetings. This practice negates the expert character of the Sub-Com-

mission and leads to the decisions to adopt delaying tactics or to publish only muted criticisms of governments.

In view of the strength of governmental feeling it is perhaps unfair to blame UN officials for timidity in interpreting their duties narrowly. They appear to be acting according to the dictates of their employers. Though they may be called international civil servants, they are not servants of the world community in the sense of individual human beings but of the world community which is made up of nation states.

Problems of human rights are generally experienced by individuals or groups of individuals vis-a-vis their own governments. It is apparent that many governments are hypersensitive to any outside attempt to interfere in such matters and, because they hold the real power in the United Nations, they have so far been able to oppose efforts to set up effective enforcement machinery. It is significant that there is a "double standard" in UN treatment of complaints.[12] Complaints relating to colonial territories are more effectively processed than others. In these cases the individual is not complaining against "his own government", since there is widespread sentiment in the UN in favour of self-determination for colonies. Though Aborigines may complain that they are victims of internal colonialism, they are not so obviously colonial inhabitants as are the people of Papua New Guinea.

It is unlikely that the government of any other country will take effective action on behalf of Australian Aborigines. Improvement of their situation will depend on their own efforts and on action taken on their behalf by sympathetic NGOs. But in the light of the conclusion that UN sanctions are relatively ineffectual, should Aborigines turn away from the international forum and concentrate instead on action on the domestic front?

I believe that it would be unduly pessimistic to give up international action altogether. Though the United Nations has at its disposal nothing which can force a completely intransigent government to change its behaviour, that is not to say that taking the matter there is totally without effect.

Publicity as a Sanction

The most important effect of raising a violation of human rights in a UN forum is in its potential for influencing a government fearing world public opinion. "Despite the harsh realities of power politics world opinion *is* a force to be reckoned with."[13]

Other writers have expressed the view that publicity is a dangerous weapon, only to be used as a last resort. They fear that the government concerned will react by hardening its policies and indulging in self-justification rather than constructive change. However, this largely depends on the particular government faced with international criticism. The Australian government has shown itself to be responsive to the force of world public opinion and there is reason to believe that international criticism can add to the weight of criticism from within the country about its Aboriginal policy and practices.

This brings us back to one of the questions raised earlier in this article: could the FIDA oral intervention have been used more effectively? It is clear that if the main aim of raising a human rights issue before the United Nations is to bring pressure to bear on the domestic government, then an intensive publicity campaign must be mounted to ensure that public opinion

is aroused and that the relevant government is aware of it. In this respect there was insufficient action accompanying the FIDA intervention.

The election of the Labor government in December 1972 and its first steps to implement its policy on Aboriginal land rights have taken some of the heat out of the issue and made it less necessary to rely on international sanctions. So far this article has proceeded on the assumption that Aboriginal human rights have been violated by the denial of land rights. However, there has been some argument within Australia as to whether Aboriginal claims to land are properly characterised as issues of land "rights" or whether they must be referred solely to the moral sphere. The only Australian decision on the matter denies that domestic law gives the Aborigines any "right" to land based on traditional occupation.[14] The Labor government's promise to transfer land rights to Aborigines rests on its recognition of the justice of their claim rather than on any legal arguments.

It is possible that even if an international forum existed in which individuals had a right of petition concerning violations of human rights, the matter could not be taken very much further. While one may agree that there exists a body of international customary law, nations differ in the degree to which they have accepted different parts of it. Australia has not yet ratified ILO Convention 107 which is the most specific UN statement on the rights of indigenous populations, including their land rights. Could an International Court of Human Rights (if it existed) enforce against a government the whole body of international customary law or only those human rights treaties it has ratified? The question points up again how far the world has to go before there is an effective international legal system and how each nation can still determine for itself the degree to which it will be bound by the international law which does exist.

Yet here in the field of the content of international law publicity can also be an effective sanction. Public opinion can bring pressure to bear on governments to ratify UN Conventions or to abide by the provisions of those it has not yet ratified.

It therefore seems worthwhile for Aboriginal organizations to devote some of their resources to action at the United Nations. The links which are now developing between indigenous peoples in many countries may lead to the formation of an effective international pressure group able to influence the policies of national governments.

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1 Hereafter referred to as FIDA, the acronym for the Spanish version of the Federation's name

2 Land rights is the issue of highest priority amongst Aborigines. But they can also complain of a denial of human rights in many other fields. See G Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (ANZ Book Company, Sydney, 1973), Appendix 7, for documentation of infringements of the Universal Declaration of Human Rights by Queensland legislation.

3 See R S Clark, *A United Nations High Commissioner for Human Rights* (Martinus Nijhoff, The Hague, 1972), p 27-9, 36-8, for further details of this procedure. Chapter I is an excellent source of information on International Human Rights Activity and has been used extensively in the preparation of this Article.

4 ECOSOC res 1074C (XXXIX) of 28 July 1965, para 13

5 UN Doc E/CN 4/Sub 2/L 458 (1967), at p 4

6 ECOSOC res 1503 (XLVIII) of 27 May 1970
7 *Disappointing Start to New UN Procedure on Human Rights*, 9 Rev International Comm Jurists 5(1972)
8 Statement to the United Nations Economic and Social Council (52nd Session) concerning the 28th session of the United Nations Commission on Human Rights, 7 *La Abogada Newsletter* 11 (1972). Other examples of delay by the Commission were given in this Statement submitted by a number of NGOs.
9 R S Clark, op cit (fn 2 above) at p 21
10 In particular, this article has omitted references to enforcement methods used by the International Labour Organization, which are generally conceded to be more efficient than those of other United Nations organizations. This topic requires further investigation by Aborigines and their supporters as the ILO has taken an interest in indigenous populations.
11 W Macmahon Ball, book review of *Defeat of an Ideal* by Shirley Hazzard, *Age*, 23 June 1973, p 18
12 R S Clark, op cit (fn 2 above) at p 23
13 Dr Abram, the former United States representative on the Commission on Human Rights, as quoted *in* R S Clark, op cit (fn 2 above) at p 92
14 *Milirrpum v Nabalco Ltd* (1971) 17 FLR 141